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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/626,947

07/25/2003

Lawrence Edward Dolan

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27752

7590

04/24/2006

THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION
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EXAMINER

KRASS, FREDERICK F

ART UNIT

PAPER NUMBER

1614

DATE MAILED: 04/24/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/626,947	Applicant(s) DOLAN ET AL.	
	Examiner Frederick F. Krass	Art Unit 1614	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 06 April 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☒ They raise the issue of new matter (see NOTE below);
 (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: 1-11.


Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
 13. ☐ Other: _____.


 Frederick F. Krass
 Primary Examiner
 Art Unit: 1614

Continuation of 3. NOTE:

1) Claim 13 introduces a new issue for consideration under 35 U.S.C. 103(a); the claims did not previously require that the colorant particles in the first and second phase be the same. Further searching would also be required to assess the state of the art and to find related teachings.

2) That recitation also appears to raise a potential new issue under 35 U.S.C. 112, second paragraph insofar as a composition having the same particles in each phase is inconsistent with and thus potentially lacks antecedent basis in claim 1, which requires the first and second phases have contrasting colors.

3) The proposed amendment further raises a potential issue of new matter under 35 U.S.C. 112, first paragraph, insofar as it is not clear that a recitation that the colorant particles be generically "the same" is supported by specific formulations limited only to the working examples (the "same" in what respect? chemical identity? color? size?).

Continuation of 11. does NOT place the application in condition for allowance because:

1) Applicant has not specifically responded to the arguments made previously by the examiner in the passage bridging the bottom of page 5 to the top of page 6 of the final rejection (dealing with optimization). The examiner stands by that reasoning as the basis for a finding of obviousness regarding the use of differing levels of colorants.

2) The factual basis for applicants' assertion that the striped dentifrices of Wong are "very typical examples" of the prior art wherein one phase contains a colorant particle but the other other contains the same amount of colorant particle, or does not contain any colorant particle (remarks, p. 5, para. 3) is not clear from this record. See for instance Table 1 (col. 5) of USP 5,876,701 (also to Wong), wherein dentifrice "A" contains 1.0 percent entrained lake, and dentifrice "B" contains 0.5 percent titanium dioxide. Insofar as can be determined, this toothpaste is no more or less "typical" than any other, and yet it contains differing levels of colorants. And furthermore, even assuming (purely arguendo) the veracity of this assertion, the examiner's rationale is grounded in case law (In re Aller and Peterson) having broad applicability, and thus is not negated simply because one particular embodiment (a working example) does not mirror same.

3) The significance of applicants' assertion the they have "found that colorant particle in a different amount in each phase will provide the striped appearance desired by the present invention" (remarks, p. 5, para. 3) is unclear since according to the language of claim 1, subsection a1, the presence of an effective amount of colorant in the first phase alone is sufficient to create colored striped appearance in that phase (irrespective of the appearance of the second phase).